

No. 13-0565 PO

On April 11, 2013, the Director of the Department of Public Safety (“the Director”) filed a complaint seeking to discipline Bottorff. Bottorff was personally served with a copy of the complaint and our notice of complaint/notice of hearing on June 6, 2013. He filed an answer on July 23, 2013. With his answer, Bottorff included a certified copy of court records from the Clay County Circuit Court, showing that he was tried for second-degree assault and acquitted by a jury.

We held a hearing on August 13, 2013. Assistant Attorney General Ron Dreisilker represented the Director. Bottorff did not appear.

The case became ready for our decision on September 27, 2013, when the Director filed his written argument.

Findings of Fact

1. Bottorff is licensed by the Director as a peace officer. His license was current and active at all relevant times.

2. On December 22, 2008, Bottorff was on duty as a deputy for the Clay County, Missouri, Sheriff's Department.

3. That night, the Claycomo police arrested Joe Crosley on a traffic warrant that had been issued by that municipality. They brought Crosley to the Clay County Sheriff's Department for a municipal hold.

4. During the intake process, Crosley admitted to Bottorff and another deputy, Dusty Hancock, that he was carrying illegal drugs¹ in his body cavities.

5. Crosley, Hancock, and another officer took Crosley to another room, where Bottorff directed Crosley to strip and "get it [the drugs] out." Crosley undressed. Bottorff gave Crosley a container for the drugs, and demanded that he "get it out" several times.

6. Crosley told them he would do so, but asked to be allowed some privacy. He complained and did not produce the drugs, but did not act in a violent or threatening manner. The policemen repeatedly told him to "get it out."

7. After a few minutes, Bottorff sprayed oleoresin capsicum (mace) into Crosley's face and eyes. Bottorff then punched Crosley approximately thirteen times in the face, back,

¹ It is unclear from the evidence (a DVD recording of Crosley's booking and subsequent interrogation) what he might have been carrying in his body cavities. However, the dialogue and circumstances make it reasonably clear that the parties are referring to controlled substances of some kind that Crosley illegally possessed. Because of the uncertainty, we simply refer to the substances in this decision as "the drugs."

buttocks, and other parts of his body with his fist, while the other two officers held him down. For most of these punches, Bottorff held the mace canister in his hand, which increased the impact of the punch.

8. After being held down and punched, Crosley was bruised and bleeding. He repeatedly told the officers that he would produce the drugs, but they told him to “stop resisting,” held him down on the floor, and shackled him. While they were doing so, Crosley repeatedly screamed for help and told them he could not breathe.

9. The officers then moved Crosley to an emergency restraint chair, while he was still naked. They placed a spit hood over his face, while he continued to complain he could not breathe. He eventually produced a small baggy into the spit hood.

10. Crosley told the officers that he still had drugs concealed in his rectum.

11. The officers released Crosley from the chair and told him again to produce the drugs, in front of them.

12. Crosley squatted, naked, in front of Bottorff and Hancock and tried to evacuate the drugs. Bottorff aimed a taser at Crosley’s genitals. Crosley pleaded, “don’t tase me,” and “please don’t kill me.”

13. All of these events were recorded on DVD by the Clay County Sheriff’s Department.

14. Crosley was unable to evacuate the drugs and was eventually taken to a local hospital to have them removed from his body.

15. Bottorff was tried for second-degree assault in connection with this incident. A jury returned a verdict of not guilty on November 15, 2012.

Standard of Practice for Detainees Believed to Possess Contraband

16. If peace officers in a detention facility believe an inmate or detainee is in possession of contraband, the standard of practice is to take the following steps:

- a. First, to ask the detainee to retrieve the contraband from his body cavity on his own if he can do so without harming himself or any other person;
- b. Second, to put the detainee into a “dry cell,” or a cell with toilet facilities but no running water, and wait 30 to 45 minutes to allow the detainee additional time to retrieve the contraband himself;
- c. Third, to ask medical staff to determine whether the detainee needs to go to the hospital to have the contraband extracted from his body cavity; and
- d. Fourth, to take the detainee to the hospital to have the contraband extracted by hospital personnel.

Use of Tasers and Force

17. Tasers should not be pointed at the head or genitals of an individual, due to the potential injury that could result from a taser to those areas.

18. Peace officers recognize certain standards of practice with regard to the use of force. Force may be justified when necessary to protect a subject from causing harm to himself or to another.

19. The Clay County Sheriff’s Department has adopted a policy on the use of force. Under the policy, personnel are directed to use “only that force which appears reasonably necessary, given the facts and circumstances perceived by personnel at the time of the event, to effectively bring an incident under control while protecting the lives of others.”² Any

² Pet. Ex. 5 (pages unnumbered).

application of force must be judged by a standard of reasonableness, considering a number of factors. Those factors include:

- a. The conduct of the individual;
- b. “Human factors” such as age, size, strength, number of personnel and number of subjects;
- c. Influence of drugs and alcohol (mental state);
- d. Proximity of weapons;
- e. Availability of other options;
- f. Seriousness of the suspected offense;
- g. Training and experience of personnel;
- h. Risk of escape; and
- i. Other exigent circumstances.³

Conclusions of Law

We have jurisdiction to hear this complaint. Section 590.080.2.⁴ The Director has the burden of proving by a preponderance of the evidence that Bottorff has committed an act for which the law allows discipline. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012) (dental licensing board demonstrates “cause” to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

The Director argues that there is cause for discipline under § 590.080, RSMo Supp. 2012:

1. The director shall have cause to discipline any peace officer licensee who:

³ Pet. Ex. 5 (pages unnumbered).

⁴ RSMo Supp. 2012. Statutory references, unless otherwise noted, are to RSMo 2000.

* * *

(2) Has committed any criminal offense, whether or not a criminal charge has been filed;

(3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person[.]

Criminal Offense – Subdivision (2)

The Director argues that Bottorff committed the criminal offense of third-degree assault.

Section 565.070 defines that crime.

1. A person commits the crime of assault in the third degree if:

(1) The person attempts to cause or recklessly causes physical injury to another person; or

* * *

(3) The person purposely places another person in apprehension of immediate physical injury; or

(4) The person recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or

(5) The person knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative[.]

A peace officer may use force under certain circumstances. For example, § 563.046.1 provides that a law enforcement officer:

need not retreat or desist from efforts to effect the arrest . . . of a person he reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee. . . . [H]e is . . . justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.

Likewise, § 563.056.1 provides that “[a] guard or other law enforcement officer may . . . use physical force when he reasonably believes such to be immediately necessary to prevent escape

from confinement or in transit thereto or therefrom.” However, a peace officer “is prohibited from using any more force than is necessary to effect the arrest; his doing so will constitute an assault.” *State v. Thomas*, 625 S.W.2d 115, 122 (Mo. 1981). Section 563.061.2 provides that “[a] warden or other authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use whatever physical force, including deadly force, that is authorized by law.” The Clay County Sheriff’s Department has adopted these principles for the behavior of its officers in its policy on the use of force.

None of the exigencies described in the above statutes or in Clay County’s policy is present in this case. While Crosley did not fully and promptly cooperate with Bottorff and his fellow officers in producing the drugs on his person, he did not act in any violent, aggressive, or threatening manner. He did not try to escape. He did not possess a weapon. Moreover, the Director established through expert testimony the standards of practice for peace officers to retrieve illegal drugs or contraband from persons who have concealed such substances in their body cavities. Those standards do not include beating the person up. In short, no circumstances indicated the use of force, particularly the violent force and degrading treatment to which Crosley was subjected.

Bottorff’s conduct falls into four prongs of the statute defining third-degree assault. First, he recklessly caused physical injury to Crosley. § 565.070.1(1). Under § 562.016.4, a person is reckless if he “consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.” Bottorff caused physical injury to Crosley by repeatedly punching him. When he did so, he was consciously disregarding the substantial and unjustifiable risk of physically injuring Crosley, and he was deviating from standards of practice for peace officers in general and Clay County officers in particular.

Second, by pointing a taser at Crosley’s genitals, Bottorff purposely placed Crosley in apprehension of immediate physical injury. § 565.070.1(3). Third, through his repeated punching and his pointing the taser at Crosley’s genitals, Bottorff recklessly engaged in conduct that created a grave risk of serious physical injury to Crosley. § 565.070.1(4). Finally, Bottorff caused physical contact with Crosley that he knew Crosley would regard as offensive or provocative. Because of the violent nature of the physical contact, we conclude that he did so “knowingly.” § 565.070.1(5).

The fact that Bottorff was acquitted in a prosecution for second-degree assault in connection with this incident does not change our analysis. First, the elements of first and second-degree assault are different. *Compare* §§ 565.060 and 565.070. Second, “even *substantive* acquittals in criminal prosecutions are not relevant to the civil license discipline administrative proceedings in which the administrative tribunal is separately determining whether a crime was committed.” *Schumer v. Lee*, 404 S.W.3d 443, 447 n.3 (Mo. App. W.D., 2013). Third, all of the statutes allowing peace officers to use reasonable force under limited circumstances also specify that the officer “shall have the burden of injecting the issue of justification” into the proceeding. §§ 563.046.4, 563.056.3, and 563.061.6. Bottorff apparently availed himself of this defense when he was prosecuted for second-degree assault.⁵ Even if we construe his answer to have injected the issue, we have viewed the entire video of Crosley’s booking and interrogation, and find that Bottorff was not justified in his use of force.

In summary, Bottorff committed the crime of assault in the third degree. Because we determine that Bottorff committed this criminal offense, he is subject to discipline under § 590.080.1(2).

⁵Certified records of Clay County Circuit Court attached to Bottorff’s answer.

Moral Turpitude/Reckless Disregard – Subdivision (3)

The Director also argues that Bottorff may be disciplined under § 590.080.1(3) for committing an act while on active duty that involves moral turpitude or the reckless disregard for the safety of the public or any person. We agree. Bottorff was on active duty at the time of the events in question. By repeatedly punching a prisoner – one who had threatened no violence to himself or others, nor made any attempt to escape – to the point that he was bruised, bleeding, and screaming for help, Bottorff displayed a reckless disregard for Crosley’s safety.

Moral turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything “done contrary to justice, honesty, modesty, and good morals.”

In re Frick, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)).

While peace officers and jailers may be called upon to use force to prevent escape, maintain order, or prevent violence or harm to themselves or others, violent and unnecessary force is a clear breach of the “duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything ‘done contrary to justice, honesty, modesty, and good morals.’” Bottorff breached those duties by inflicting unnecessary violence and force upon Crosley. His actions involved moral turpitude. There is cause to discipline his license under § 590.080.1(3).

Summary

There is cause to discipline Bottorff under § 590.080.1(2) and (3).

SO ORDERED on November 7, 2013.

/s/ Karen A. Winn

KAREN A. WINN
Commissioner